STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-4
	)	
Application for Certification for	)	
the East Altamont Energy Center	)	
	)	

STAFF'S RESPONSE TO THE APPLICANT'S COMMENTS ON THE ERRATA TO THE REVISED PRESIDING MEMBER'S PROPOSED DECISION

I. INTRODUCTION

The applicant and other parties submitted comments on the Errata to the Revised Presiding Member's Proposed Decision (Errata) on July 3, 2003. The applicant, in their comments, has requested several substantial changes to the conditions of certification. Staff respectfully provides the following comments on these proposed changes for clarification purposes.

II. AIR QUALITY

A. Mitigation for Significant, Adverse Air Quality Impacts in the San Joaquin Valley is Legally Required Pursuant to California Environmental Quality Act (CEQA).

- *The applicant claims that there is no legal requirement that they provide offsets in the San Joaquin Valley. (Applicant's Comments on the Errata to the Revised Presiding Member's Proposed Decision, July 3, 2003, (Applicant's Comments) p. 2 fn.1.)*

The CEQA requires that state agencies ensure that all significant, adverse impacts resulting from projects subject to their approval be mitigated. (Pub. Resources Code § 21000 et seq.) There is substantial evidence in the record supporting both staff's and the San Joaquin Valley Unified Air Pollution Control District's (SJVUAPCD) positions that the project will cause a significant adverse air quality impact in the San Joaquin Valley, and the emission reduction credits purchased to satisfy Bay Area Air Quality Management District (BAAQMD) regulations do not adequately mitigate this impact. (Exh. 1, pp. 5.1-1through 72; Exh. 4G3; Exh. 5D.) Based on such evidence, the Commission cannot approve the project without mitigation unless it finds that mitigation of the impacts in the San Joaquin Valley is infeasible and that overriding considerations justify approval despite the significant impacts. (Pub. Resources Code § 21080; Cal.

Code Regs., tit. 20, § 1755.) There is no evidence in the record supporting a determination that the identified mitigation is infeasible. Thus, CEQA and the Commission's regulatory program require that the mitigation be imposed for project approval.

B. The Applicant Acknowledges That the Mitigation Identified by SJVUAPCD Was Calculated on an Annual Basis, But Their Argument That the Offsets Obtained Were Not Intended to Last the Life of the Project Are Not Supported by the Record and Contradict the Requirements of CEQA.

- *The applicant argues for the first time that the 66.8 tons of NOx offsets identified by SJVUAPCD were only required on an annual basis for the duration of the programs from which they were obtained. (Applicant's Comments, p. 3.)*

The applicant acknowledges in their comments on the Errata that the calculations used to determine the project's liability, and thus, the mitigation required, were based on a tons per year unit of measurement. (Applicant's Comments, p. 3.) The applicant now argues, however, that the Air Quality Mitigation Agreement (AQMA) did not intend to mitigate for the life of the project. The intent of the AQMA, however, is beside the point. CEQA requires that a project's significant, adverse impacts be mitigated. There is no dispute that the project is projected to operate for a minimum of 30 years and the project has the same potential to emit, 263 tons of NOx, each year. Pursuant to CEQA, mitigation must be provided for project approval for every year the project emits and causes a significant, adverse impact. On that basis, the project must provide mitigation for every year of its operation, regardless of the intent of the AQMA.

C. Changes to Condition of Certification AQ-SC5 Are Unwarranted, Unsupported by the Record, and Would Unnecessarily Complicate the Compliance Process.

- *The applicant claims that the mitigation requirement of 66.8 tons per year identified by the SJVUAPCD is based on a "safety factor" and thus the condition of certification should refer to 33.4 tons per year. (Applicant's Comments, p. 5.)*

There is no evidentiary support for the applicant's proposal to reduce the required mitigation from 66.8 to 33.4 tons per year. The emission liability of the project that SJVUAPCD identified as requiring mitigation, with the applicant's concurrence, has always been the final calculation of 66.8 tons per year of NOx. Other methods used for this project and the similarly sized Tesla project to determine the mitigation requirements arrived at approximately the same amount of offsets, and more, without the use of any "safety factor." There is no evidence in the record to support any determination that less than 66.8 tons per year of NOx offsets would be sufficient to mitigate the project's impact. Therefore, there is no legitimate reason to change the condition.

- *The applicant proposes that the condition should be altered to allow a 2 ton/year decrease in the mitigation requirement for 1 ton/year of actual emission reduction. (Applicant's Comments, pp. 5-6.)*

This change is not supported by any evidence in the record. No testimony has been provided justifying a two-for-one reduction and there is no evidence in the record indicating that the project could further reduce its emissions. Additionally, this alteration would make the condition unworkable and would inject a significant amount of uncertainty into what mitigation is ultimately required.

If, in the future, the project is in fact able to reduce its emissions considerably, then the project owner is free to work out a banking arrangement for such credits with the SJVUAPCD, resulting in credits that satisfy the rules and are fully fungible. Nothing in the Committee's condition would prevent this.

- *The applicant proposes that the condition specify that the mitigation requirement ends if either the emission limit is reduced by 33.4 tons/year or, due to advances in emission control technology, the project's actual emissions are reduced. (Applicant's Comments, p.6.)*

This change, along with some of the others, attempts to accommodate a potential scenario the applicant claims may occur, but the potential existence of such a scenario is not supported by any evidence in the record. Air quality offsets have always been based upon a project's potential to emit over its useful life, and there is no evidence in the record supporting the notion the project would emit less than 263 tons per year for less than 30 years, and there is certainly no evidence in the record supporting the notion that significant advances in emission control technologies during the life of this project are currently foreseen that would eliminate this project's need to mitigate. Conditions of certification must address the project as currently proposed. If, in the future, the applicant wishes to change the project's emission control technology, then they are free to come to the Commission for an amendment, at which time any warranted changes to the conditions can be analyzed and addressed. Just as the applicant would not have the Commission impose additional mitigation in the event of any unforeseen and speculative additional impacts, it would be inappropriate to change the condition now to accommodate a reduction in mitigation for speculative and unidentified future scenarios.

- *The applicant claims that staff's position on air quality mitigation is "ironic given the disdain with which the CEC staff places most air district regulatory programs – including the offset programs." (Applicant's Comments, pp. 4-5 fn. 2.)*

The challenges faced by the San Joaquin air district are considerable and the location of the East Altamont Energy Center (EAEC) and its emissions only add to those challenges. Staff's efforts were, and continue to be, directed toward providing effective mitigation and tools that ensure projects approved by the Commission do not impair the air districts' ability to reach attainment. While staff may have some differences of

opinion regarding methodology used in analyzing impacts, staff respects and appreciates the work done by the SJVUAPCD as well as the other California air districts.

D. Conclusion

The Committee's condition of certification AQ-SC5 is a workable condition that is fully supported by substantial evidence in the record. The applicant offers no support in the record for the substantial changes it proposes at this late date.

III. SOIL AND WATER RESOURCES

In their comments to the errata, the applicant suggests some changes to Soils&Water 5 and offers their interpretation of the various provisions of the condition. Staff offers the following in response to the applicant's proposed interpretations.

A. The Plans for the Recycled Water Pipeline are Subject to Review and Approval by the Commission and its Chief Building Official (CBO), even if the Pipeline is Constructed by a Public Agency.

- *The applicant interprets the condition as allowing a public agency to construct recycled water pipeline and to be responsible for review and approval of the pipeline in lieu of the Commission's CBO. (Applicant's Comments, p. 14.)*

Although the project owner may negotiate with another entity to perform the actual construction and operation of the pipeline, the project owner remains responsible for ensuring the pipeline complies with the condition of certification, as with all other project components. As proposed by the applicant, the pipeline is an integral part of the project and, as such, remains subject to the review and approval of the Commission and its CBO for purposes of checking for compliance with the conditions, even if a public agency were to construct it.

B. It is Unwarranted and Inappropriate to Remove Reference to the Byron-Bethany Irrigation District (BBID) and the Mountain House Community Services District (MHCSD) from Condition of Certification Soils&Water 5.

- *The applicant suggests removing reference to both BBID and MHCSD in Soils&Water 5. (Applicant's Comments, p. 14.)*

The record supports referring to BBID and MHCSD in the condition. The applicant has identified the MHCSD waste water treatment plant (WWTP) as the only feasible source of recycled water. It has repeatedly claimed that no other source of recycled water would be feasible for use at EAEC. (Applicant's Testimony in Support of the Application for Certification, p. 2.15-23.) Therefore, the condition was written based on substantial evidence in the record and the project as proposed – with the use of recycled water from MHCSD WWTP.

Additionally, the environmental effects of the project have been analyzed based upon the recycled water pipeline from MHCSD, as proposed by the applicant. Therefore, reference to this specific pipeline is appropriate and necessary to ensure there is no ambiguity as to what pipeline is required to be built. If the applicant determines that they wish to use a pipeline route that was never proposed, its impacts must be analyzed in an amendment proceeding. At that time the condition of certification could be altered to accommodate the change.

C. The Determination of How Much Recycled Water is "Available" to Satisfy the Condition Should not be Left Exclusively to a Recycled Water Agreement.

- *The applicant interprets the condition as leaving the definition of "available" to a recycled water agreement between the applicant and a third party, the recycled water provider. (Applicant*'s Comments, p. 15*.)*

Based on the record, "available" refers to whatever amount of recycled water is produced by MHCSD that is not used by MHCSD itself or other customers. For example, if any recycled water is being discharged into Old River, then that recycled water is clearly available to be used by EAEC. To allow the term to be defined differently by an agreement with a third party would usurp the Commission's responsibility and authority to ensure implementation and enforcement of the conditions of certification in the manner intended and as supported by the record.

D. The Comparability of Recycled Water and Fresh Water is Based Upon Actual Charge to EAEC.

- *The applicant interprets the condition as stating that, when determining whether the cost of recycled water is comparable to fresh water, the cost of the recycled water pipeline and undetermined conveyance and delivery costs shall be factored in. (Applicant's Comments, p. 15.)*

In order to simplify the compliance process, the determination of price comparability between recycled and fresh water should be based on actual charges. BBID will undoubtedly establish a specific charge for every unit of fresh water and either BBID or MHCSD will do the same for every unit of recycled water provided to EAEC. To avoid any unnecessarily complex accounting scheme, the determination of comparability should be based on actual charges. The applicant provides no explanation or support in the evidentiary record as to why it should be otherwise.

E. No Further Workshops on These Matters are Warranted or Necessary.

- *The applicant requests another workshop to discuss the water issues if their "interpretations" of the water condition are not accepted. (Applicant's Comments, p. 2.)*

Soils&Water 5 is based on evidence that has been the subject of public workshops, hearings, extensive cross-examination, legal briefs, and comments on the proposed decision. The applicant has not identified any new issue that requires further discussion and the applicant has been given ample opportunity to express their position on the Committee's decision. For these reasons, no additional workshop is necessary.

IV. CONCLUSION

The conditions of certification contained in the Committee's Errata are well drafted and respond fairly to the concerns raised regarding the RPMPD. Moreover, the changes are fully supported by the record and help ensure that the project will comply with all applicable laws, ordinances, regulations, and standards. The applicant has offered no legitimate reason for why they need to be changed.

Respectfully submitted,

DATED: July 10, 2003

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Staff Counsel